

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-244

In the Matter of

Amendment of Section 73.202(b).	RM-8027
Table of Allotments.	RM-8182
FM Broadcast Stations.	RM-8183
(Charlotte Amalie, Cruz Bay, Frederiksted and Christiansted Virgin Islands and Aguada, Gurabo, Utuaado, San Juan, Ponce and Carolina, Puerto Rico) ¹	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 14, 1995;

Released: July 26, 1995

By the Chief, Allocations Branch:

1. At the request of Robert E. Miller, Jonathan Cohen and Arthur V. Belendiuk, d/b/a Calypso Communications ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7236 (1992), proposing the substitution of Channel 267B for Channel 246B at Charlotte Amalie, Virgin Islands, and the modification of Station WVN(X)(FM)'s construction permit accordingly (RM-8027). Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. Paradise Broadcasting Corporation ("Paradise"), permittee of Station WDCM(FM), filed comments and a counterproposal proposing the substitution of Channel 267B for Channel 222B at Cruz Bay, Virgin Islands, and the modification of Station WDCM(FM)'s construction per-

mit accordingly (RM-8182).² Comments and a counterproposal were also jointly filed by El Mundo Broadcasting Corporation, licensee of Station WKAQ-FM, San Juan, Puerto Rico; Estereotempo, Inc., licensee of Station WIOC-FM, Ponce, Puerto Rico; Radio Redentor, Inc., licensee of Station WERR-FM, Utuado, Puerto Rico; and Aurio Matos, licensee of Station WNNV-FM, Aguada, Puerto Rico ("counterproponents"), proposing the substitution of Channel 287B1 for Channel 288A at Aguada, Puerto Rico, and the modification of Station WNNV(FM)'s construction permit accordingly. Additionally, counterproponents request the reallocation of Channel 281B from Utuado to Gurabo, Puerto Rico, and the modification of Station WERR-FM's license to reflect the change of community of license. In order to accommodate their proposal, counterproponents propose the substitution of Channel 285B for Channel 284B at San Juan, Puerto Rico; the substitution of Channel 283B for Channel 286B at Ponce, Puerto Rico; the substitution of Channel 267B for Channel 246B and the substitution of Channel 298B for Channel 282B at Charlotte Amalie, Virgin Islands; the substitution of Channel 300B for Channel 299B at Carolina, Puerto Rico; the allotment of Channel 282A at Frederiksted, Virgin Islands; and the allotment of Channel 274A at Christiansted, Virgin Islands (RM-8183).³ Comments were filed by Virgin Islands Stereo Communications Corporation ("VISC") and Asociacion Puertorriquena Del Este De Los Adventistas Del Septimo Dia ("Adventistas"). Adventistas also filed a supplement to its comments.⁴ Reply comments were filed by petitioner, Paradise, counterproponents, VISC and Radio Redentor, Inc. VISC also filed further reply comments. Petitioner filed a motion for extension of time to file reply comments.⁵ After the pleading cycle closed, counterproponents filed a motion for leave to file supplemental comments.⁶

2. *Pleadings.* In support of its proposal, petitioner states that Station WVN(X)(FM) was granted a construction permit (BPH-870707MI) for Channel 246B at Charlotte Amalie, Virgin Islands. However, petitioner claims it cannot construct and operate a Class B facility on the channel without causing objectionable electrical interference to Channel 247C, Tortola, British Virgin Islands. Petitioner asserts that the problem can be eliminated if Station WVN(X)(FM) op-

¹ The communities of Cruz Bay, Aguada, Gurabo, Utuado, San Juan, Ponce, and Carolina, Puerto Rico, have been added to the caption.

² We note that Station WDCM(FM)'s construction permit (File No. BPH-930106JI) was assigned from Paradise Broadcasting Corporation to Jersey Shore Broadcasting Corporation (File No. BAPH-G) on December 28, 1993 and consummated on January 14, 1994.

³ Public Notice of the counterproposals was given on February 17, 1993, Report No. 1927.

The counterproponents filed identical comments and counterproposal in MM Docket Nos. 92-244, 92-245 and 92-247. After the pleading cycles closed, counterproponents filed a consolidated notice of withdrawal in all three dockets. An affidavit was filed by counterproponents stating that no consideration was received in exchange for their withdrawal pursuant to Section 1.420(j)(1) of the Commission's Rules. We will grant the withdrawal request. Accordingly, responsive pleadings to the counterproposal are moot and will not be discussed herein.

⁴ Adventistas submitted a supplement of an executed affidavit by its consulting engineer of the technical exhibit (Appendix B) originally filed with its comments.

⁵ An extension of time for petitioner to file reply comments was informally granted on January 19, 1993.

⁶ Although the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods, counterproponents' supplemental comments were accompanied by a motion for leave to file. However, with the withdrawal of the counterproponents' petition, the supplemental comments which are in response to VISC's allegation that two affected parties were not served are now moot and will not be discussed herein.

After the pleading cycle closed, a letter was also filed by Richard L. Biby ("Biby") of Communications Engineering Services, refuting petitioner's representation that Biby had prepared petitioner's engineering statement. A motion to strike Biby's unauthorized was filed by petitioner. We find that the pleadings do not provide us with information of decisional significance. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, we will not accept the unauthorized pleadings.

erates on another frequency. Petitioner suggests that Channel 267B would be an acceptable substitution that satisfies the Commission's technical requirements.

3. In its counterproposal, Paradise requests the substitution of Channel 267B for Channel 222B at Cruz Bay, Virgin Islands, to eliminate harmful electrical interference with Channels 219C and 222B1 in Tortola, British Virgin Islands. In support of its proposal, Paradise states that the substitution of Channel 267B for Channel 222B at Cruz Bay would provide the community with its first local aural transmission service. Paradise acknowledges that both petitioner and Paradise seek substitutions of their respective channels to eliminate harmful international electrical interference. However, Paradise asserts that under FM priority three, a first local aural transmission service at Cruz Bay should be preferred over a ninth local transmission service at Charlotte Amalie, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 90-93 (1982).⁷ Paradise claims that Charlotte Amalie already has eight (three AM and five FM) local transmission services. Paradise maintains that the Commission has long recognized the importance of providing a community with its first local aural transmission service, citing *Atchison et al, Kansas*, 7 FCC Rcd 4645 (1992); *Alegria I, Inc.*, 61 RR 2d 136 (1986); *Caldwell Broadcasting Corp.*, 100 FCC 2d 115 (1985); *Alessandro Broadcasting Corp.*, 99 FCC 2d 1 (1984). Further, Paradise claims that under priority four, Paradise's proposal should prevail over petitioner's proposal because the public interest would be better served by the substitution of Channel 267B for Channel 222B at Cruz Bay. Additionally, Paradise states that Cruz Bay is the principal city on the island of St. John. As such, maintains Paradise, it is the primary source of local information for the residents of the island. In addition, the island's Medical Center, post office, library, government administrative offices, telephone company and other utilities offices, as well as several churches, schools and shops are located in Cruz Bay. Paradise claims that Cruz Bay is St. John's primary sea port and the only one at which cargo and cruise ships dock. Furthermore, Paradise alleges that Cruz Bay is also the home of numerous civic and social organizations. Accordingly, Paradise concludes that the public interest benefits of a first local aural transmission service at Cruz Bay outweigh the need for a ninth local aural transmission service at Charlotte Amalie. Therefore, Paradise requests that the substitution of Channel 267B for Channel 222B at Cruz Bay be granted, and that petitioner's request for the substitution of the same channel at Charlotte Amalie be denied. Paradise states its intention to apply for Channel 267B at Cruz Bay, if allotted.

4. In its opposing comments, VISC alleges that the site proposed by petitioner for Channel 267B at Charlotte Amalie is "sheltered by mountains" and completely blocks the possibility of any line-of-sight transmission from the St. John antenna to Charlotte Amalie. VISC submits a terrain profile demonstrating the shadowing that would result and contends that the site does not provide city grade coverage, and is, therefore, not in compliance with Section 73.315 of the Commission's Rules. VISC argues that petitioner's contention that Channel 246B at Charlotte Amalie would cause harmful interference with Channel 247C in Tortola, British Virgin Islands, is not valid since petitioner had "full knowledge" of the Tortola problem.⁸ Moreover, VISC asserts that an additional station would cause a financial hardship on existing stations and would best be deferred until such time as it is "economically feasible." Accordingly, VISC concludes that since petitioner knew of the possible electrical interference with the Tortola allotment at the time its application was filed, petitioner should not be allowed to use that problem to justify changing channels.⁹ Also, since the substitution of Channel 267B at Charlotte Amalie would not provide 70 dBu coverage because of shadowing, VISC urges that petitioner's proposal be denied.¹⁰

5. In its reply comments, petitioner argues that VISC's opposition to the substitution of Channel 267B at Charlotte Amalie is without merit. Petitioner submits an engineering analysis showing that at reference coordinates 18-21-26 and 64-56-50, either Channel 267B or Channel 298B, in conformance with the various proposals advanced in this proceeding, can be allotted at Charlotte Amalie without terrain shadowing limitations.¹¹ In addition, petitioner asserts that coverage of a community is properly addressed at the application stage where certification must be made that the 3.16 mV/m contour of a station serves the community without any major terrain obstruction. Petitioner argues that its proposed substitution is in the best interest of the public, and that Paradise's proposal has no merit and is "faulty." Accordingly, petitioner urges that its proposal to substitute Channel 267B for Channel 246B at Charlotte Amalie be granted.

6. In response to Paradise's counterproposal, petitioner states that Paradise claims that Channel 267B is the only alternate Class B channel available at Cruz Bay, but offers no justification for use of a Class B channel. Petitioner suggests that Cruz Bay can be adequately served by a Class A channel. Petitioner states that Cruz Bay has a population of 1,928¹² and the island of St. John has a population of 2,472. Petitioner also states that the island has a land area of 51 square kilometers. Petitioner submits an engineering

⁷ The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3)]

⁸ VISC notes that petitioner was the only applicant filing for Channel 246B at Charlotte Amalie, and had it not been for this fact, it would not have been permitted to "amend out" of a tenderability defect relating to multiple ownership in its original application.

⁹ We note that a party's acceptance of a conditioned construction permit does not preclude our action to resolve later conflicts that may arise.

¹⁰ Our engineering analysis has determined that at the petitioner's proposed reference coordinates, 18-20-30 and 64-43-59, there would be no major obstructions to prevent 70 dBu signal

coverage to Charlotte Amalie. Therefore, the proposed substitution would be in compliance with Section 73.315 of the Commission's Rules.

¹¹ We note that with the withdrawal of the counterproponents' proposal, the allotment of Channel 298B at Charlotte Amalie is no longer a viable alternative. However, our engineering analysis confirms petitioner's claim that Channel 267B can be allotted to Charlotte Amalie at proposed reference coordinates 18-21-26 and 64-56-50 without a major terrain obstruction.

¹² Population figures taken from the 1980 U.S. Census. However, the 1990 Census population figures for Cruz Bay and St. John are 2,466 and 3,504, respectively.

analysis showing that at least two Class A channels (275A and 296A), which meet the Commission's technical requirements, are available at Cruz Bay that would provide coverage not only to Cruz Bay but to the entire island of St. John. Consistent with other actions taken in this rule making proceeding, petitioner asserts that Paradise has excluded these alternatives.¹³ Accordingly, petitioner urges that Paradise's proposal be viewed as disingenuous and rejected.

7. In its reply comments, Paradise reiterates its earlier arguments and states that it has no objection to the substitution of an alternate viable channel at Cruz Bay which would allow both proposals to be accommodated. Paradise notes that the Commission fully considered the merits of allotting a Class B channel at Cruz Bay before the allotment was made several years ago. Paradise contends that it is neither appropriate now to reconsider that decision nor incumbent upon petitioner to suggest that a Class A channel could be substituted for an allotted Class B channel. Paradise concludes that if the channel substitution is made on a comparative basis, Paradise's proposal should prevail.

8. In its reply comments, VISC supports Paradise's proposal to substitute Channel 267B for Channel 222B at Cruz Bay. However, VISC notes that because of potential electrical interference with British Virgin Islands' allotments, Paradise probably was not "significantly challenged" for the grant of Channel 222B at Cruz Bay. Thus, claims VISC, if Channel 267B is allotted at Cruz Bay, the public should be allowed to apply for the new allotment. Accordingly, VISC urges the Commission to grant Paradise's proposal. In its further reply comments, VISC reiterates its objection to adding a new channel to the Virgin Islands because of economic reasons. However, if the Commission allots Channel 267B at Charlotte Amalie or Cruz Bay, VISC states its desire to apply for the substituted channel.¹⁴ In sum, VISC urges the Commission to accept other expressions of interest for Channel 267B to assure that the best "steward" is selected for the channel.¹⁵

9. In response to Paradise's counterproposal, Adventistas, licensee of Station WZOL(FM), states its support for the substitution of Channel 267B at Cruz Bay. Adventistas claims that Station WZOL(FM), Channel 221A, Luquillo, Puerto Rico, is short-spaced to Station WDCM(FM)'s construction permit site for Channel 222B at Cruz Bay. In addition, Adventistas states that Station WZOL(FM) has lost the future use of its transmitter site, and thus has filed an application (File No. BPH-930208II) to relocate its

transmitter site approximately 7 kilometers (4.4 miles) east-southeast of its present site.¹⁶ Adventistas alleges that the substitution of Channel 267B for Channel 222B at Cruz Bay would allow Station WZOL(FM) to operate at full power, enabling the station to serve a population of 809,813 compared to a population of 307,833 in the service area proposed in the pending application. Therefore, Adventistas maintains that the additional population which would receive new service from Station WZOL(FM)'s expanded coverage is significant and is in conformance with the Commission's FM priorities, citing *Revision of FM Assignment Policies and Procedures, supra*; *Stamps and Camden, Arkansas*, 3 FCC Rcd 3644 (1988); *Chippewa Falls, Wisconsin and Red Wing, Minnesota*, 4 FCC Rcd 6323 (1989). Accordingly, Adventistas urges the Commission to grant Paradise's proposal to substitute Channel 267B for Channel 222B at Cruz Bay.

10. *Discussion.* This proceeding presents a number of unique factors for consideration. Each proposal involves a station which received its construction permit conditioned on the outcome of negotiations with the British Virgin Islands. Each station is now precluded from operating on its originally allotted channel due to subsequent allotments made in the British Virgin Islands. After careful consideration of the pleadings before us, we conclude that approval of the proposed channel substitutions at both Charlotte Amalie and Cruz Bay to eliminate the harmful electrical interference caused by these British Virgin Islands' allotments is warranted. In an effort to provide each community with a channel substitution, the staff conducted a channel search to see if alternate channels were available. However, neither the proponents nor the Commission's staff has been able to find an alternate Class B channel for either community. Our analysis indicates that Channel 267B is the only channel which meets the Commission's domestic technical requirements that can be allotted at each community. Therefore, we will comparatively consider the proposals. Our comparative analysis shows that neither proposed substitution would provide a first or second full-time aural service to either Charlotte Amalie or Cruz Bay. In fact, the entire primary service 60 dBu contour area of each station, at its proposed substituted channel, is already well-served by at least five full-time reception services. The proposed primary service contour area for Channel 267B would serve 107,652 people if allotted at Charlotte Amalie, and 168,175 people if allotted at Cruz Bay. Although we will not do a *de novo* analysis pursuant to the allotment priorities, we will use them as a

¹³ We find that petitioner's claim that Paradise does not justify its use of a Class B channel is without merit. Here, Paradise seeks the substitution of another Class B channel for one that has previously been allotted to the community. Therefore, petitioner's suggestion that there are at least two Class A channels available at Cruz Bay is not relevant because Paradise has not requested one.

¹⁴ VISC asserts that its ownership of a station in the Virgin Islands should not preclude it from filing an expression of interest in Channel 267B. VISC claims that petitioner has not divested its interest in Station WJCK(FM) in Christiansted, even though the commitment was made over five years ago. VISC concludes that at least for the present, petitioner's principals should be viewed as having two stations in the Virgin Islands.

¹⁵ We reject VISC's argument that Channel 267B, if allotted to either Cruz Bay or Charlotte Amalie, should be open to the public for either expressions of interest or competing applica-

tions. VISC and other interested parties had the opportunity during the window periods for these allotments to file their applications. Furthermore, the proponents' construction permits have already been granted and the sole purpose of the channel substitutions is to eliminate harmful international electrical interference. Accordingly, we find that affording the public an opportunity to apply for the substituted channels is unwarranted.

¹⁶ In order to avoid exacerbating the interference problem with Station WDCM(FM), Station WZOL(FM) has proposed to operate at less than full Class A power and to use a directional antenna to provide contour protection pursuant to Section 73.215 of the Commission's Rules. The alteration of Station WZOL(FM)'s service contours to protect Station WDCM(FM) causes "shrinkage" in the service area which means the population served within the primary service contour is smaller than it would be if the antenna were omnidirectional at full Class A power.

guide in our comparison. *See Revision of FM Assignment Policies and Procedures, supra.* Neither petitioner nor Paradise has claimed that the proposed channel substitutions would provide either a first or second full-time aural service. However, the channel substitution at Cruz Bay would provide the community with its first local transmission service, which triggers priority three. On the other hand, the channel substitution at Charlotte Amalie would provide the community with its ninth local transmission service, which triggers priority four--other public interest matters. In examining the merits of these proposals, we find that channel substitution at Cruz Bay is preferred because it triggers a higher allotment priority since it would provide a first local transmission service. Charlotte Amalie, by comparison, already has three local AM and five FM transmission services. Therefore, we believe the public interest would be served by the substitution of Channel 267B for Channel 222B at Cruz Bay, since it would provide the community's with its first local competitive broadcast service. An engineering analysis has determined that Channel 267B can be allotted to Cruz Bay in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.0 kilometers (11.8 miles) west.¹⁷ As proposed, we will also modify Station WDCM(FM)'s construction permit to specify operation on Channel 267B at Cruz Bay. Pursuant to petitioner's request, the procedures outlined in *Modification of FM & TV Licenses*, 8 FCC 2d 916 (1984), and Section 1.420(g) of the Commission's Rules, do not apply in this case since no upgrade in facilities is contemplated. We believe Channel 267B is equivalent to Channel 222B for allotment purposes. Therefore, we consider channels of the same class to be equivalent unless showings have been made that a station cannot be constructed for reasons such as environmental consequences or air hazards. *See Vero Beach, Florida*, 3 FCC Rcd 1049 (1988), *rev. denied*, 4 FCC Rcd 2184, 2185 (1989).

11. In addressing VISC's arguments regarding the "economic infeasibility" of new allotments in the Virgin Islands, we note that the proponents do not request new allotments per se, rather they seek channel substitutions to enable the stations to operate on their allotted Class B channels without electrical interference. Furthermore, VISC's concerns that additional allotments in the Virgin Islands would increase competition raise issues which the Commission has already determined not relevant in either a licensing or allotment context. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989). Consequently, there is no basis under the current state of Commission precedent for consideration of those issues. In a related context, there is no Commission requirement for Paradise Broadcasting Corporation or any other party to demonstrate a "demand" or need for an allotment aside from the already stated willingness of Paradise to apply for Channel 267B at Cruz Bay and construct the proposed facilities.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS

ORDERED, That effective **September 11, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Cruz Bay, Virgin Islands	267B

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Jersey Shore Broadcasting Corporation for Station WDCM(FM), Cruz Bay, Virgin Islands, IS MODIFIED to specify operation on Channel 267B in lieu of Channel 222B, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WDCM(FM)'s construction permit BPH-930106JL, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-930106JL, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

14. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee, as follows:

Jersey Shore Broadcasting Corporation
P.O. Box 1000
Manahawkin, New Jersey 08050

15. IT IS FURTHER ORDERED, That the proposal filed by Robert E. Miller, Jonathan Cohen and Arthur V. Belendiuk, d/b/a Calypso Communications, to substitute Channel 267B for Channel 246B at Charlotte Amalie, Virgin Islands (RM-8027), IS DENIED.

16. IT IS FURTHER ORDERED, That, at their request, the counterproposal jointly filed by El Mundo Broadcasting Corporation, Estereotempo, Inc., Radio Redentor, Inc. and Aurio Matos, to substitute Channel 287B1 for 288A at Aguada, Puerto Rico and to reallocate Channel 281B from Utuado to Gurabo, Puerto Rico (RM-8183), IS DISMISSED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

¹⁷ The coordinates for Channel 267B at Cruz Bay are North Latitude 18-21-31 and West Longitude 64-58-21.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
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